

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.498 OF 1997

The State of Maharashtra for)
Vilas Sahebrao Gadakh,)
R/o.Mauje Sukene, Tal. Niphad,)
Dist. Nashik.).. Appellant)
(Org.Complainant)

Vs.

1. Dilip Baburao Parkhe,)
Age 23 years,)

2. Hemant Vijay Jadhav,)
Age 23 years.)

3. Dilip Madhukar Kadam,)
Age 23 years.)

4. Vijay Jamanshing Roy,)
(Dead))

5. Chandrashekhar Vijay Jadhav,))
Age 20 years.)
All r/o.Ojhar, Taluka-Niphad,))
District - Nashik.)
(Respondents)
(Org. Accused)

--

Shri A.S.Shitole, APP for the State.
None present for the respondents.
--

CORAM : V.G.PALSHIKAR &
R.C.CHAVAN, JJ
DATED : 6TH JULY, 2005

ORAL JUDGMENT : (Per R.C.Chavan, J)

1. Taking exception to acquittal of respondents

by the learned Additional Sessions Judge, Nashik, for offences punishable under Sections 147, 148, 324 and 307 read with Section 149 of Indian Penal Code or in the alternative of the offence punishable under Section 307 read with 34 of Indian Penal Code, the State has preferred this appeal.

2. Facts which led to the prosecution of

respondents are as under:-

. At about 6.30 p.m. on 13th December, 1991,

complainant Vilas Sahebrao Gadakh and his friends Rashid Sattar, Sunil Gadakh, Anil Kadam and Dilip Kadam were near a Giant Wheel in the fair of Khanderao Maharaj at village Ojhar. Dilip Parkhe, Hemant Vijay Jadhav, Dilip Madhukar Kadam, Vijay Jamshing Roy and Chandrashekhar Vijay Jadhav scuffled with the complainant Vilas and his friend. Anil was assaulted with knife, swords and draggers resulting injuries to both hands of Anil. Anil was taken to Dr.Shinde's Clinic.

3. When the complainant with Rashid Sattar and

Dilip Kadam were passing by the road near hotel

Shivam, the accused Dilip Madhukar Kadam, Sharad Aher, Dilip Parkhe, Hemant Jadhav and Vijay Roy came in a jeep armed with weapons like swords, knives, iron bars and iron pipes. The complainant and those with him went to hotel Shivam on seeing the accused approach. The accused persons assaulted Dilip Baburao Kadam leading to injuries to his head, back, abdomen, hands and legs. When people gathered, accused escaped. Dilip Kadam was then taken for treatment. In course of treatment of Dilip Kadam, it was found that injuries sustained by him were of serious nature and in ordinary course the same could have proved fatal.

4. On a report by Vilas, an offence was registered and investigation commenced. Police procured medical certificates of victims, examined the witnesses and on completion of investigation, sent the charge sheet to the learned Judicial Magistrate, First Class, Pimpalgaon, who committed the case to the Court of Sessions, Nashik. Charge of offence punishable under Sections 147, 148, 324, 307 read with 149 or 34 of Indian Penal Code was framed against the accused. Accused pleaded not guilty of the said charges and claimed to be tried. They were therefore put on trial.

5. The prosecution examined as many as 15

witnesses. The defence of the accused, as appearing from the cross-examination of these witnesses and statements under Section 313 of the Code of Criminal Procedure, is that the accused persons themselves were assaulted by the complainant and the other prosecution witnesses at Ojhar Bus Stand and that they have been falsely involved in this case by the complainant taking advantage of his political influence. The defence examined one Eknath Tarachand Thakur as defence witness.

6. Accused Vijay Roy died during pendency of the case and the case as against him had abated. Upon consideration of material before him, the learned Additional Sessions Judge held that the prosecution failed to prove the charges levelled against the accused persons, and therefore, proceeded to acquit all the accused of all the charges. Aggrieved by acquittal of all accused, the State has appealed.

7. We have heard the learned Additional Public Prosecutor for State but did not have an advantage of hearing learned counsel for respondents.

8. The learned Additional Sessions Judge has observed that the incident was a fall-out of political tussle between two groups, one led by Malojirao Mogal

and the other one by Raosaheb Kadam in the election of sugar factory. Though the accused persons were charged of having committed rioting and being armed with deadly weapons, the learned Additional Sessions Judge observed that the prosecution failed to recover a single weapon from any of the accused persons. The learned Additional Sessions Judge further pointed out that report at Exhibit-39 mentions participation of one Sharad Aher in the first scuffle at the fair of Khanderao Maharaj as also in the second incident near hotel Shivam. However, the said Sharad Aher was found, in course of investigation, to have been away at Nashik, and therefore, he was not sent for trial by police. A report under Section 169 of Code of Criminal Procedure was made in respect Sharad Aher. If Sharad Aher was to be excluded, the learned Additional Sessions Judge found that only four persons had participated in the assault, leading to the conclusion that an unlawful assembly would not be said to have been formed because, participants' number was less than five. Consequently, unless specific overt acts on the part of each of the accused is proved, it would not be possible to fasten them with liability by taking recourse to acting in prosecution of common object of assembly. This logic of the learned Additional Sessions Judge is unassailable. It may be seen that in the report Exhibit-39, name of

Chandrashekhar Jadhav, accused No.5, was not mentioned in respect of both the incidents. The learned Additional Sessions Judge observed that even the Investigating Officer, Shri Ukirde could not explain as to how Chandrashekhar Jadhav, accused No.5, came to be arrayed as an accused.

9. The learned Additional Sessions Judge has carefully considered the evidence in respect of the first incident at the fair ground as well as the second incident in front of hotel Shivam. While in the report Exhibit-39 in respect of first incident, it was stated that complainant was accompanied by Rashid Sattar Mansuri, Sunil Gadakh, Anil Kadam and Sunil Kadam, in the evidence before the Court, the complainant as well as Dilip Kadam and Anil Kadam told that they were accompanied by Sunil Kadam, Prashant Shinde and Anil Kadam. P.W.1, complainant- Vilas Sahebrao Gadakh categorically stated that he was not accompanied by Rashid Sattar Mansuri, Sunil Kacharu Gadakh and Dilip Bhaurao Kadam and could not explain as to how their names came to be mentioned in the report at Exhibit-39. Thus, it seems that the very participants in the incident have been changed by the complainant in course of his evidence before the Court.

10. In this context, the evidence tendered would have to be evaluated to find out whether the participation of respondents in assault on complainant and others was established by prosecution and whether the learned Additional Sessions Judge erred in coming to the contrary conclusion. The prosecution examined Dr.Nitin Gadkari, who was serving as Medical Officer in H.A.L.Hospital at Ojhar. He proved injuries of Anil Kadam. He stated that Anil Kadam had lacerated wound over left temporo-parietal region, multiple abrasions over chest, back, right forearm and right leg and blunt injury around 9th & 10th Dorsum. He further stated that Anil Kadam also had a black left eye and haematoma over left maxilla, left clavical with a suspected fracture. He proved the case papers of Anil Kadam at Exhibit-54. He admitted in cross-examination that the injuries are possible by fall of a person riding on a motor-cycle. All injuries found on the person of Anil Kadam were simple.

11. P.W.9 Shri Bhavsar, who is Administrative Officer in H.A.L.Hospital at Ojhar, had brought the requisite medical case papers of Anil Kadam. P.W.10-Dr.Abhay Shukla was working as Medical Officer at Nagji Hospital at Nashik. He proved endorsements on police requisitions to the effect that Dilip Kadam

was not fit to make a statement, at Exhibits 59 and 60, as also similar endorsements of his colleagues Dr.Ms.Uttara Patil, Dr.Miss Wig and Dr.Mahesh Rajendra at Exhibits 61 to 64. P.W.11 Dr.Devdatta Kulkarni, Medical Officer at Nagji Memorial Hospital at Nashik, also stated to the same effect and proved his certificate at Exhibit-66.

12. P.W.12-Dr.Gorakh Kabara, Medical Officer working in Nagji Hospital, stated that he had examined Dilip Kadam and found an abdominal wound below coastal margin on both sides, i.e. right and left sides, on the person of Dilip Kadam. He stated that he could not definitely say from the nature of injuries that Dilip would have succumbed to the injuries had there been no immediate medical treatment. Location of injuries was on vital part. Injuries were sutured. In cross-examination, he admitted that injuries were skin deep. He stated that he sought to know history. However, the same was not given either by the patient or the person accompanying him, and therefore, he made an endorsement that "history not known properly". He denied that injuries were possible if a person riding on a motor-cycle falls off and hits against a sharp object. He proved medical record of treatment of Dilip at Exhibit-68.

13. From the evidence of Dr.Kabara, it is clear that the injuries were merely skin deep and though situated on the part of body concealing vital parts, could not have the potential to cause death. It may be seen that even Dr.Kabara was ambivalent in this regard.

14. The evidence of other witnesses would have to be looked into to find out whether the learned Trial Judge was in error in concluding that the respondents were not proved to be the authors of these injuries. As already pointed out, P.W.1-Vilas- complainant has made vital departure from his report at Exhibit-39 in respect of persons participating in the assault. He admitted that Raosaheb Kadam and Dilip Kadam are his maternal uncles and he worked for Raosaheb in the elections. He also admitted that one Mogal contested the elections against Raosaheb and while Raosaheb was defeated, Mogal was elected. He admitted that all the accused persons were friends of Sharad Aher who worked for Mogal in the elections. Thus, the fact that the complainant was in the opposite political camp qua the respondents is admitted by the complainant himself.

15. P.W.2-Dilip, who had sustained injuries in the incident, stated that his brother Raosaheb was a Member of Legislative Assembly who defeated Malojirao

Mogal presumably after the incident and before the witness was examined in the case. He admitted that relations between the group of Raosaheb and Malojirao Mogal are strained. While this can, undoubtedly, be the cause of assault by the respondents, probabilities thereof have to be weighed. According to the evidence of P.W.1, Malojirao Mogal had defeated Raosaheb in the elections prior to the said incident. Hence, rather than Mogal's party being smarting under an insult of defeat, it would be Raosaheb's party which would have a desire to settle the scores.

16. P.W.2-Dilip admitted that he was an accused in a Sessions Case but denied that he was prosecuted for having allegedly attempted to take life of one Ganjappa Pujari.

17. P.W.3-Anil Kadam, who had suffered an injury on a little finger of his right hand by sword of accused Shekhar Jadhav and an injury to his back and near the left eye by accused Dilip Parkhe, stated about an attack at the fair ground. He stated that when he was narrating the incident to his uncle Dilip Kadam near Hotel Shivam, the accused attacked him (Anil Kadam) and inflicted injuries on Dilip Kadam. He too admitted that he was helping his uncle Raosaheb Kadam as and when Raosaheb contested the elections.

There are number of omissions in his police statement which were admitted by P.W.3-Anil in paragraph 3 of his deposition. He also contradicted the version in the police statement that Sanjay Karpe and Kumar Jadhav took him to Dr.Wagh. Thus, the version of this witness is not consistent.

18. P.W.4-Baban Limbaji Gawli and P.W.5-Ramesh

Daulatrao Deshmukh stated that five persons assaulted Dilip kadam and Anil Kadam in front of hotel Shivam. P.W.4 claimed that he carried Dilip Kadam to Dr.Shinde's clinic. P.W.4 claims that he is running a hotel on Mumbai-Agra Road just opposite to hotel Shivam. P.W.4 admitted that there were no street lights along side Mumbai Agra Road near his hotel. There was a crowd of 50 persons in front of hotel Shivam when he heard commotion from his hotel. Evidence of both these witnesses too is riddled with omissions amounting to improvements and contradictions with police statement.

19. P.W.6-Ashok Baburao Kadam is a Panch of

seizure of clothes, at Exhibit-47, from Dilip Kadam, who was undergoing treatment, in the hospital. This seizure does not in any manner help in linking accused to crime.

20. P.W.14-PSI Rakhamaji Jijaba Ukirde, Investigating Officer, admitted that since there was a fair, there was adequate police bandobast at the spot. He himself also was on the bandobast duty. As rightly observed by the learned Trial Judge, in spite of this it is curious that none from the police party had witnessed this incident in a small village-fair. Had any policeman or an independent witness visiting the fair seen the incident, his evidence would have been of immense value. P.W.14-PSI Ukirde duly proved all omissions and contradictions in the evidence of prosecution witnesses as also the steps taken by him in the prosecution.

21. P.W.15-API Bhagwan Bhole sent charge sheet after taking over an investigation from PSI Ukirde.

22. Foregoing analysis of prosecution evidence in respect of the incident would show that only partisan witnesses were examined though at a village fair independent witnesses would have been present. The evidence of these witnesses is discrepant right from the names of participants in the events to other details. The Investigating Officer could not recover a single weapon. Thus, except for the bare words accusing respondents of assaulting complainant and his friends, there is no other evidence to lend credence

to the partisan verbal account of the incident.

23. In the context of enmity between the two groups, these words alone, without any circumstantial corroborative evidence, were rightly discarded by the learned Trial Judge as inadequate, to support the conclusion of guilt of respondents.

24. In view of the above, since the conclusions drawn by the learned Trial Judge are neither improbable nor perverse, but possibly the only conclusions that could have been drawn on the evidence tendered, we see no reason to interfere with the findings recorded by the learned Additional Sessions Judge, Nashik.

25. In the result, the appeal fails and is hereby dismissed.

(V.G.PALSHIKAR, J)

(R.C.CHAVAN, J)